No. 14357

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court
for the Southern District of California,
Central Division.

HAYDEN C. COVINGTON,

124 Columbia Heights,
Brooklyn 1, New York,

Counsel for Appellant.

FILED

PAUL P. O'BRIEN
CLERK

INDEX

Subject Index

PAGE

Jurisdiction 1

Statement of the case 2

The facts 3

Questions presented and how raised 5

Specification of errors 8

Summary of argument 8

Argument

Point One

The undisputed evidence shows that the appellant was not given an opportunity to go through the induction ceremony and therefore he is not guilty of refusing to submit to induction. 12-14

Point Two

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A. 14-18

Point Three

Appellant was deprived of a fair hearing before the appeal board because the recommendation of the Department of Justice was based on his belief in self-defense; and the conclusion that appellant based his objections on a personal moral code is inconsistent with the facts. 19-21

PAGE

Point Four

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation. 21-26

Conclusion 26

Cases Cited

Annett v. United States
10th Cir., June 26, 1953, 205 F. 2d 689 .... 10, 11, 18, 19

Billings v. Truesdell
321 U. S. 542, 559 12

Brewer v. United States
4th Cir., April 5, 1954, 211 F. 2d 864 25

Corrigan v. Secretary of the Army
9th Cir., March 5, 1954, 211 F. 2d 293 12

Degraw v. Toon
2d Cir., 151 F. 2d 778 .... 12, 25

Dickinson v. United States
346 U. S. 389 (Nov. 30, 1953) 17

Interstate Commerce Comm'n v. Louisville & Nashville R. R. Co.
227 U. S. 88, 91-92, 93 25

Jessen v. United States
10th Cir., May 7, 1954, — F. 2d— 10, 17, 18

Jewell v. United States
6th Cir., Dec. 22, 1953, 208 F. 2d 770 .... 10, 17, 18

Kwock Jan Fat v. White
253 U. S. 454, 459, 463 .... 12, 25

Linan v. United States
9th Cir., 1953, 202 F. 2d 693 20

PAGE

Lowe v. United States
8th Cir., Feb. 19, 1954, 210 F. 2d 823 10

Morgan v. United States
304 U. S. 1, 19, 22, 23 .... 12, 25

Oregon R. R. & Navigation Co. v. Fairchild
224 U. S. 510, 524 25

Pine v. United States
4th Cir., April 5, 1954, 212 F. 2d 93 .... 10, 17, 18

Schuman v. United States
9th Cir., Dec. 21, 1953, 208 F. 2d 801 .... 10, 17, 18

Taffs v. United States
8th Cir., Dec. 7, 1953, 208 F. 2d 329 ...... 10, 11, 17, 18

United States v. Abilene & S. Ry. Co.
265 U. S. 274, 290 25

United States v. Alvies
N. D. Cal. S. D., May 28, 1953, 112 F. Supp. 618 10

United States v. Balogh
2d Cir., May 26, 1946, 157 F. 2d 939, 329 U. S. 692,
2d Cir., 160 F. 2d 999 25

United States v. Benzing
W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 598.... 10

United States v. Close
7th Cir., June 10, 1954, — F. 2d — 11, 17, 18

United States v. Everngam
D. W. Va., 1951, 102 F. Supp. 128 .... 11, 20

United States v. Graham
W. D. Ky., 1952, 109 F. Supp. 377, 378 10

United States v. Hagaman
3rd Cir., May 13, 1954, — F. 2d — 11

United States v. Hartman
2d Cir., Jan. 8, 1954, 209 F. 2d 366 .... 10, 11, 17, 18

United States v. Lowman
W. D. N. Y., Jan. 15, 1954, 117 F. Supp. 595 10

PAGE

United States v. Pekarski
2d Cir., Oct. 23, 1953, 207 F. 2d 930 .... 10, 11, 18, 19
United States v. Rodriguez
D. P. R., Feb. 24, 1954, 119 F. Supp. 111 10
United States v. Simmons
7th Cir., June 15, 1954, — F. 2d — 17
Weaver v. United States
8th Cir., Feb. 19, 1954, 210 F. 2d 815 .... 10, 17

STATUTES AND REGULATIONS CITED

Federal Rules of Criminal Procedure, Rule 37(a) (1), (2) 2
Regulations, Selective Service (32 C. F. R. § 1602 *et seq.*) — Section —
1622.14 .... 10, 15
1626.25 21
1626.26 24
SR 615-180-1, 23 (army regulation specifying induction procedure) 9
United States Code, Title 18, Section 3231 2
United States Code, Title 50, App. §§ 451-470 (Universal Military Training and Service Act) — Section —
1(c) 26
6(j) 9, 14, 16
United States Constitution, Amendment V 26

No. 14357

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JACK WARREN BRADLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Southern District of California, Central Division. [11][1]

[1] Numbers appearing in brackets herein refer to pages of the printed Transcript of Record, except when "F" precedes the numbers. In that event the numbers appearing within brackets refer to the draft board file, received in evidence and marked as Government's Exhibit 1. Papers in the draft board file are numbered by a written longhand figure which is encircled.

The district court made no specific findings of fact. These were waived. No reasons were stated by the court in writing for the judgment rendered. The court below stated no reasons for the conviction. [36]

The trial court found appellant guilty. [37] Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. [3-4] This Court has jurisdiction of this appeal under Rule 37(a)(1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [13]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. It was alleged that after appellant registered and was classified, he was ordered to report for induction. It is then alleged that on or about May 18, 1953, appellant "knowingly failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do." [3-4]

Appellant pleaded not guilty. [4] He waived the right of trial by jury. Findings of fact and conclusions of law were also waived. [5]

After receiving evidence and hearing testimony, the court considered a motion for judgment of acquittal made by appellant. [7, 10, 36] The motion was denied. [37] The appellant was convicted. [36] He was sentenced to serve a period of eighteen months in the custody of the Attorney General. [11-12] Notice of appeal was timely filed. [13] The transcript of the record (including the statement of points relied upon) has been timely filed in this Court.

THE FACTS

Jack Warren Bradley was born September 18, 1932. [F 1, 11] He registered with his local board on September 20, 1950. [F 1-2] On September 14, 1951, he notified the local board of a change of address. [F 5] On September 24, 1951, the local board mailed the classification questionnaire to the wrong address. [F 3, 13-15] On October 5, 1951, the registrant wrote the local board that he had misplaced the questionnaire and requested another one. [F 13, 16] The local board mailed a duplicate questionnaire on October 8, 1951, along with special form for conscientious objector. [F 4, 6]

The classification questionnaire was filed on October 26, 1951. [F 6] He indicated he was a minister of religion but was not serving regularly as such and had not been formally ordained. [F 8] His occupation was repairing rails and distributing tie plates for the Great Northern Railroad. [F 9-10] He completed elementary school and junior high school and completed three years of high school but did not graduate. [F 11] He signed series XIV showing he was a conscientious objector. [F 12]

He filed a special form for conscientious objector on October 26, 1951. [F 18] He showed he was opposed to both combatant and noncombatant military service. [F 18] He believed in a Supreme Being and had obligations that were superior to those arising from any human relation. [F 18] He described the nature of his beliefs, showing he was not to take part in world affairs but must serve God rather than his country. [F 18] The basis of his religious training and belief was given. He relied on his mother for religious guidance. [F 19] He listed his preaching activity as a demonstration of the consistency of his religious convictions. [F 19] He gave his educational background, his various occupations and residences. [F 19-22] He gave the names of his parents and indicated his father's religion was Christian and his mother's was Jehovah's Witnesses.

[F 22] He was a member of Jehovah's Witnesses and Watchtower Bible and Tract Society, the legal governing body of his church. [F 22] He stated that such religious organization does not participate in any kind of war either combatant or noncombatant. [F 22] He listed references to prove his sincerity. [F 23]

On January 22, 1952, the local board placed him in Class I-A. [F 13, 27] This classification denied his conscientious objector status and made him liable to unlimited military service. He appealed and requested a personal appearance. [F 13, 30-34] Accompanying the letter was an affidavit proving his status as one of Jehovah's Witnesses. [F 28-29] The local board notified him to appear on February 11, 1952. [F 13, 35] He appeared, his case was reopened and he was again placed in Class I-A. [F 13, 36] The board made a memorandum finding that he had said he had made a pledge to serve God and could not move away from it and that he could not serve both God and country. [F 36-38] The local board notified him of the new classification. [F 13, 39] He appealed from such classification. [F 13, 40-42] On February 18, 1952, the file was forwarded to the appeal board. [F 13] The appeal board reviewed the file and made an entry which required the case to be referred to the Department of Justice for inquiry and hearing. [F 13] The file was forwarded to the United States Attorney on April 7, 1952. [F 43]

A secret FBI investigation and report thereon was made. There was a hearing before a hearing officer of the Department of Justice. [F 48-49] [32-32] The hearing officer made his report to the Department of Justice in Washington. The Department made a recommendation to the appeal board on March 19, 1953, against the conscientious objector claim because appellant would fight in self-defense, and his conscientious objector position was his own philosophy, and his objections were not deep-rooted religious convictions. [F 49] The Department of Justice recommended that the appeal board classify the appellant in I-A. [F 49]

On April 9, 1953, the appeal board classified him in I-A, upon the recommendation of the Department of Justice. [F 50] He was notified of such classification on April 13, 1953. [F 13] He was thereupon ordered to report for induction on May 18, 1953. [F 13, 51] He reported as ordered. [25]

At the induction station he was told to take a new physical examination. He was fingerprinted. He was asked if he was a conscientious objector and didn't believe in fighting. [25] He was then sent to another room where he gave his name and address. Then he was turned over to a sergeant who told him to write out a statement that he refused to be inducted into the armed services. [26] Appellant did so. [53, 55, 65] The sergeant told him the penalty for not submitting to induction. [26] The appellant was never processed to the point of being requested to submit to induction. He was not put into the line-up of selectees. His name was not called nor was he requested to take the symbolic one step forward which is the induction ceremony whereby he would have been formally requested to enter the armed forces of the United States. [26]

At the trial appellant testified that if he had been given an opportunity of taking the one step forward or going through the induction process, he would not have stepped forward or submitted to induction. [32-33]

QUESTIONS PRESENTED AND HOW RAISED

I.

At the induction station appellant was never requested to take the one step forward. The induction officials did not put him in the line-up with the other selectees, call out his name and request him to submit to induction. [25-26] He was merely requested to sign a statement that he refused to submit to induction. [26-32] When he signed this statement he was discharged. [25-26, 32-33] He testified that

had he been requested to go through the induction ceremony, he would have refused to do so. [32-33]

In the motion for judgment of acquittal it was contended that the appellant was never asked to submit to induction and therefore he is not guilty of refusing to submit to induction as charged in the indictment. [9] The motion for judgment of acquittal was denied. [6]

The question presented here, therefore, is whether the undisputed evidence shows that the appellant did not refuse to submit to induction as charged in the indictment.

II.

The undisputed evidence showed that appellant possessed conscientious objections to participation in both combatant and noncombatant military service. He showed that these objections were based upon his sincere belief in the Supreme Being. He established that his obligations to the Supreme Being were superior to those owed to the state. He showed that his beliefs were not the result of political, sociological or philosophical views, but were based solely on the Word of God. [F 8-23] The local board placed him in Class I-A, which made him liable for service in the armed forces. [F 13] The local board forwarded the file to the appeal board. The file was referred to the Department of Justice. After a hearing on the conscientious objector claim of appellant the hearing officer recommended I-A classification. The Department of Justice concurred and recommended to the appeal board that appellant be placed in Class I-A. [F 48-49] The appeal board classified appellant in I-A, making him liable for unlimited military service. [50]

It was contended in the motion for judgment of acquittal that the denial of the conscientious objector status was arbitrary and capricious. [7] The motion was denied. [6]

The question presented here, therefore, is whether the denial of the claim for classification as a conscientious objector was without basis in fact and whether the re-

commendation of the Department of Justice and of the hearing officer, as well as the classification by the appeal board, were without basis in fact, arbitrary and capricious.

III.

The case of appellant was referred to the Department of Justice by the appeal board for appropriate inquiry and hearing. [F 43] There was a secret FBI investigation and report made. [F 48-49] There was a hearing before the hearing officer. The Department of Justice made its recommendation to the appeal board. [F 48-49] The Department recommended against the conscientious objections because the appellant would fight in self-defense. The Department illegally and contrary to the record indicated to the appeal board that appellant's conscientious objections were based on his own philosophy and not on deep-rooted religious training and belief. [F 48-49] The appeal board adopted the recommendations of the Department of Justice and denied the conscientious objector classification. [F 50]

In the motion for judgment of acquittal it was contended that the recommendation of the Department of Justice was inconsistent with the facts. [9] The motion was denied. [6]

The question presented here, therefore, is whether there was a denial of procedural due process of law because the report and recommendation of the Department of Justice to the appeal board is inconsistent with the facts and the law.

IV.

The final recommendation of the Department of Justice to the appeal board against the appellant's conscientious objector claim was mailed to the appeal board without notice to the appellant of the contents. [F 48-49] The appellant did not have an opportunity to answer the adverse recommendation before the appeal board acted on it. [29]

The appeal board, on April 9, 1953, classified appellant I-A, denied the conscientious objector claim and accepted

and relied on the recommendation of the Department of Justice without giving appellant an opportunity to answer the adverse recommendation. [F 50]

In the motion for judgment of acquittal it was contended that the procedure denied appellant's right to be heard before the appeal board finally classified him. It was contended that this procedure deprived him of his rights guaranteed by the act and Constitution. [10]

The question presented here, therefore, is whether the making of the adverse recommendation by the Department of Justice and the acceptance of it by the appeal board without giving appellant an opportunity to answer it before he was denied the conscientious objector claim deprived him of his procedural rights contrary to due process of law.

SPECIFICATION OF ERRORS

I.

The district court erred in failing to grant the motion for judgment of acquittal, duly made at the close of all the evidence.

II.

The district court erred in convicting appellant and in entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

POINT ONE

The undisputed evidence shows that the appellant was not given an opportunity to go through the induction ceremony and therefore he is not guilty of refusing to submit to induction.

The army regulations provide for the induction ceremony. Following the physical examination and selection of registrants for induction, the registrants are put through

an induction ceremony whereby each registrant is put in a line-up, his name is called, and he is requested to step forward. He is told before being requested to step forward that the taking of the one step forward constitutes his induction into the armed forces.—SR 615-180-1, 23.

The undisputed evidence shows that appellant was not given an opportunity to undergo the induction ceremony. Instead when it was found out that he was a conscientious objector he was asked if he objected to induction. He said he did. He was then requested to sign a statement refusing to be inducted and he was then discharged without being put through the induction ceremony.

The trial court should have sustained the motion for judgment of acquittal because there was no evidence that the appellant refused to undergo the induction ceremony, since appellant was never given an opportunity to go through the induction ceremony.

The trial court should have sustained the motion for judgment of acquittal.

POINT TWO

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The board of appeal, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* N. D. Cal. S. D., May 28, 1953, 112 F. Supp. 618; *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Graham,* W. D. Ky., December 19, 1952, 109 F. Supp. 377; *United States* v. *Pekarski,* 2d Cir., October 23, 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., December 7, 1953, 203 F. 2d 329; *Jewell* v. *United States,* 6th Cir., December 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., December 23, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., January 8, 1954, 209 F. 2d 366; *United States* v. *Lowman,* W. D. N. Y., January 15, 1954, 117 F. Supp. 595; *United States* v. *Benzing,* W. D. N. Y., January 15, 1954, 117 F. Supp. 598; *Weaver* v. *United States,* 8th Cir., February 19, 1954, 210 F. 2d 815; *Lowe* v. *United States,* 8th Cir., February 19, 1954, 210 F. 2d 823; *United States* v. *Rodriguez,* D. P. R. February 24, 1954, 119 F. Supp. 111; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th

Cir., May 7, 1954, — F. 2d —; *United States* v. *Hagaman*, 3rd Cir., May 13, 1954, — F. 2d —; *United States* v. *Close*, 7th Cir., June 10, 1954, — F. 2d —.

The trial court should have sustained the motion for judgment of acquittal.

POINT THREE

Appellant was deprived of a fair hearing before the appeal board because the recommendation of the Department of Justice was based on his belief in self-defense; and the conclusion that appellant based his objections on a personal moral code is inconsistent with the facts.

The recommendation of the Department of Justice recited that appellant believed in self-defense. This was apparently considered to be a basis for the denial of the conscientious objector status. The Department of Justice also recommended to the appeal board that appellant's beliefs were the result of a personal moral code and not based on deep-rooted religious training and belief. This recommendation is contrary to the facts.

The making of the recommendation that appellant be denied his conscientious objector status because of his belief in self-defense is contrary to law. It is basis for a judgment of acquittal.—*Annett* v. *United States*, 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski*, 2d Cir., October 23, 1953, 207 F. 2d 930; *Taffs* v. *United States*, 8th Cir., December 7, 1953, 203 F. 2d 329; *United States* v. *Hartman*, 2d Cir., January 8, 1954, 209 F. 2d 366.

When the Department of Justice concluded that appellant's conscientious objections were the result of a personal moral code, this flew in the teeth of the record and was inconsistent with the facts. The recommendation, therefore, deprives appellant of his rights under the law.—*United States* v. *Everngam*, D. W. Va., October 31, 1951, 102 F. Supp. 128; *Annett* v. *United States*, *supra*.

The trial court should have sustained the motion for judgment of acquittal.

POINT FOUR

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendation by the Department of Justice was adverse to appellant. The appeal board was told by the Department of Justice that appellant was not a conscientious objector. The recommendation was considered by and relied upon by the appeal board without giving appellant an opportunity to answer it before the appeal board made the final classification.

The denial of the right to answer an unfavorable recommendation is a deprivation of procedural due process of law.—*Kwock Jan Fat* v. *White,* 253 U. S. 454, 459, 463, 464; *Morgan* v. *United States,* 304 U. S. 1, 22, 23; *Degraw* v. *Toon,* 2d Cir., 151 F. 2d 778.

The trial court should have sustained the motion for judgment of acquittal.

ARGUMENT

POINT ONE

The undisputed evidence shows that the appellant was not given an opportunity to go through the induction ceremony and therefore he is not guilty of refusing to submit to induction.

The army regulations provide for the induction ceremony. Unless and until the selectee has been put through the induction ceremony he cannot be said to be in the army. —*Billings* v. *Truesdell,* 321 U. S. 542, 559; *Corrigan* v. *Secretary of the Army,* 9th Cir., March 5, 1954, 211 F. 2d 293.

The induction ceremony is prescribed by the army regulations. (SR 615-180-1) This regulation requires the induction officers to line up all the selectees in a line-up. Then each

selectee is told to take one step forward as his name is called. He is informed that this constitutes his induction into the armed forces. If the selectee refuses to step forward the induction officer is required by the regulation to take the selectee out of the line-up. The officer then explains to him his obligation to submit to induction, and if he refuses to do so he will be prosecuted. The induction officer is then required to request the selectee to stand at attention and take one step forward when his name is called again. If he again refuses to take the one step forward the induction officer is required to take a statement from him to the effect that he refuses to submit to induction. Then the selectee is released.

The undisputed evidence in this case shows that appellant complied with the order to report for induction so far as required by law. He went to the induction station. He went through the physical examination. He followed each order given to him at the induction station. When it was discovered that he was a conscientious objector and planned on not submitting to induction the induction officer did not complete the procedure prescribed by the army regulations. He stopped the process and did not complete the procedure. All that was done is that a statement was taken from appellant that he refused to submit to induction. Appellant was not given an opportunity to refuse to submit to induction. The induction officers did not complete the process. Appellant cannot be found guilty of stopping the induction process. He is not charged with having refused to complete the process. He is charged with having refused to submit to induction. The undisputed evidence shows that he was never subjected to the induction ceremony.

Before the duty of the appellant could bo established there was a duty that had to be performed by the induction officers. They were duty bound to complete the process and put appellant into the line-up or at least to formally

request him to submit to induction. He was never given the opportunity to refuse to submit to induction.

Appellant has been convicted of refusing to submit to induction because he signed a statement that he would not be inducted.

The situation here is analogous to the conviction of a man for murder. A defendant can be indicted for murder but he cannot be convicted of the offense merely because he made a statement that he was going to commit the murder. It is necessary for a shot to be fired with malice aforethought and that death result from the shot in order for the corpus delecti to be established. The corpus delecti in the offense here was never established. The appellant never committed the offense he was charged with in the the indictment. He was never brought to the point of being requested to submit to induction. All that happened was that the induction officials did not complete the process. They merely took a statement from him and released him after he stated he refused to be inducted. The mere statement that a selectee refuses to submit to induction is not equivalent to the offense of refusal to submit to induction. The corpus delecti was not established in this case.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

POINT TWO

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of Title I of the Universal Military Training and Service Act of 1951 (50 U. S. C. § 456(j), provides, in part, as follows:

> "Religious training and belief in this connection means an individual's belief in a relation to a

> Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal code."

Section 1622.14 (a) of the Selective Service Regulations (32 C. F. R. § 1622.14 (a)) provides:

> "In Class I-O shall be placed every registrant who would have been Classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is not one iota of documentary evidence that in any way disputes the appellant's proof submitted showing that he was a conscientious objector. The statement of facts made by the hearing officer of the Department of Justice and the summary of the FBI investigative report do not contradict but altogether corroborate the statements made by the appellant in his conscientious objector form.

The Department of Justice makes an extensive ex parte investigation of the claims for classification as a conscien-

tious objector when first denied by the appeal board, pursuant to 50 U. S. C. App. § 456(j). If there were any adverse evidence, certainly agents of the FBI in their deep and scrutinous investigation would have turned it up and produced it to the hearing officer to be used against the appellant. The summary supported the appellant's claim.

There is no question whatever on the veracity of the appellant. The Department of Justice and the hearing officer accepted his testimony. The appeal board did not raise any question as to his veracity. It merely misinterpreted the evidence. The question is not one of fact, but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file before the appeal board showed that the appellant was concientiously opposed to participation in combatant and noncombatant military service. He showed: (1) he believed in the Supreme Being, (2) he was opposed to participation in combatant and noncombatant military service, (3) he based his belief and opposition to service on religious training and belief as one of Jehovah's Witnesses, (4) such stand did not spring from political, sociological or philosophical beliefs. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption

from combatant and noncombatant military training and service.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States,* 346 U. S. 389 (holding that if there is no contradiction of the documentary evidence showing exemption as a minister that there is no basis in fact for the classification) also applies in cases involving claims for classification as conscientious objectors. —*Weaver* v. *United States*, 8th Cir., Feb. 19, 1954, 210 F. 2d 815; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —; *contra United States* v. *Simmons,* 7th Cir., June 15, 1954, — F. 2d —.

Recently in *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —, after quoting from *Dickinson* v. *United States,* 346 U. S. 389, the court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

The decision of the court below is in direct conflict with the holdings in other cases decided by other courts of appeal. In those cases the appellants, like appellant here, were Je-

hovah's Witnesses. They showed the same religious belief, the same objection to service and the same religious training. While different speculations were relied upon by the Government which were discussed and rejected by the courts in those cases, the courts were also called upon to say, on facts identical to the facts in this case, whether there was basis in fact. For instance, see *Jessen* where the Tenth Circuit (after following *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329) said: "The remaining question is whether there was any basis in fact for the classification made by the State Appeal Board."

The holdings of the courts with which the holding of the court below (that there was a basis in fact for denial of the classification) directly conflicts are: *Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., Oct. 23 1953, 207 F. 2d 930; *Taffs* v. *United States,* 8th Cir., Dec. 7, 1953, 208 F. 2d 329; *Jewell* v. *United States,* 6th Cir., Dec. 22, 1953, 208 F. 2d 770; *Schuman* v. *United States,* 9th Cir., Dec. 21, 1953, 208 F. 2d 801; *United States* v. *Hartman,* 2d Cir., Jan. 8, 1954, 209 F. 2d 366; *Pine* v. *United States,* 4th Cir., April 5, 1954, 212 F. 2d 93; *Jessen* v. *United States,* 10th Cir., May 7, 1954, — F. 2d —; *United States* v. *Close,* 7th Cir., June 10, 1954, — F. 2d —. And these cases ought not to be pushed aside on the specious but factitious ground that, because the courts in some of those cases discussed the speculations urged on the courts as basis in fact, the cases are different. They are not different because on the question of whether or not there was basis in fact the evidence in each case is identical to the facts in this case and the holdings were the opposite to that made by the court below in this case. Such attempted distinction would be a distinction without a difference. The cases above cited are identical to the facts in this case insofar as the statements in the draft board record showing conscientious objections are concerned.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

POINT THREE

Appellant was deprived of a fair hearing before the appeal board because the recommendation of the Department of Justice was based on his belief in self-defense; and the conclusion that appellant based his objections on a personal moral code is inconsistent with the facts.

The recommendation was against appellant by the Department of Justice because appellant believed in the use of force for self-defense. This recommendation was an illegal one. It destroyed the classification given by the appeal board.—*Annett* v. *United States,* 10th Cir., June 26, 1953, 205 F. 2d 689; *United States* v. *Pekarski,* 2d Cir., October 23, 1953, 207 F. 2d 930.

The recommendation was made against appellant by the Department because he based his objections not on religious training and belief but a personal moral code. There is not one iota of evidence in the record that appellant did not base his claim on religious training and belief. All the papers as well as the recommendation of the Department of Justice show that appellant was one of Jehovah's Witnesses and had the belief as other of Jehovah's Witnesses that he could not participate in combatant and noncombatant military service. The statement made by the Department of Justice that appellant's claim for classification as a conscientious objector is based on a personal moral code is absolutely false. It conflicts with the record. That appellant may have told the hearing officer that his conscientious objections came as a result of personal study of the Bible and discussion with others does not constitute a personal moral code. What the statute deals with is conscientious objections that are based on religious training and belief. The fact that the conscientious objections here may have come from personal study is immaterial. Every conscientious objector reaches his objections as a result of his own personal decision after study. If the recommendation of the Department of Justice is to be accepted

and followed in this case just because the conscientious objections were reached as a result of personal study, then every conscientious objector could be said to have no objections because they came from a personal code. Congress did not intend to outlaw religious objectors who reached their conclusions as a result of personal study.

The process followed by the Department of Justice is contrary to the facts and realities.

The recommendation of the Department of Justice was illegal. It became a chain in the administrative proceedings when the appeal board classified appellant in the manner that the Assistant Attorney General recommended. The classification by the appeal board was an adoption of the recommendation by the Department of Justice. The illegal defect in the recommendation tainted the entire proceedings in the draft boards and made them illegal after the recommendation was filed with the appeal board.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 9th Cir., 1953, 202 F. 2d 693.

The report of the hearing officer was adopted by the Department of Justice in its recommendation. The appeal board followed the recommendation of the Department of Justice. While the recommendation was only advisory, the fact is that it was accepted and acted upon by the appeal board. The appeal board concurred in the conculsions reached by the hearing officer and the Department of Justice. It gave appellant a I-A classification and denied him the conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* D. W. Va., Oct. 31, 1951, 102 F. Supp. 128.

It is respectfully submitted that the recommendation by

the Assistant Attorney General to the appeal board, which was accepted by the board, is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report for induction was based.

POINT FOUR

Appellant was denied his rights to procedural due process of law when the appeal board considered and acted upon the adverse recommendation made by the Department of Justice against appellant without first giving him an opportunity to answer the recommendation.

The recommendation of the Department of Justice was against appellant. The appeal board was told that the conscientious objector claim should be denied. Appellant was not given an opportunity to answer the recommendation before the appeal board made the final classification. This classification thereby denied the conscientious objector claim. The appeal board accepted and followed the recommendation by the Department of Justice.

Section 1626.25 of the Selective Service Regulations (32 C. F. R. § 1626.25) provides:

> "*Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:
>
> "(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to

noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

"(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

"(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States

Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

"(b) No registrant's file shall be forwarded to the United States Attorney by any appeal board and any file so forwarded shall be returned, unless in the "Minutes of Action by Local Board and Appeal Board" on the Classification Questionnaire (SSS Form No. 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) or paragraph (a) of this section.

"(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Department of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the nation health, safety, or interest. If the Department of justice finds that the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

"(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendaton of the Department of Justice. The appeal board shall place in the Cover Sheet (SSS Form No. 101) of the registrant both the letter containing the recommendation of the Department of Justice and the report of the Hearing Officer of the Department of Justice."

Section 1626.26 of the Selective Service Regulations (32 C. F. R. § 1626.26) provides:

"*Decision of Appeal Board.*—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

"(b) Such classification of the registrant shall be final, except where an appeal to the President is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter."

The holding by the court below that there was no deprivation of due process of law is out of harmony with many decisions. The courts have uniformly held that where an administrative determination is made upon an adverse recommendaton by a government agent it is necessary that the person concerned be advised of the governmental proposal

and be heard upon it before the final determination. In *Brewer* v. *United States*, 4th Cir., April 5, 1954, 211 F. 2d 864, the court held that consideration by the appeal board of the secret FBI investigative report, inadvertently sent to the board by the Department of Justice, deprived him of due process of law. The court found that the registrant was denied the right to answer the FBI report before the appeal board. The court, however, said erroneously that a registrant was given the right by the regulations to see and answer the recommendation of the Department of Justice to the appeal board. Contrary to that statement are the regulations which do not grant the right. The holding by the court below on this point is also in direct conflict with *Degraw* v. *Toon,* 2nd Cir., 151 F. 2d 778, and *United States* v. *Balogh,* 2d Cir., May 23, 1946, 157 F. 2d 939, vacated 329 U. S. 692, and later affirmed 2nd Cir., April 7, 1947, 160 F. 2d 999.

The holding by the court below that action on secret reports of a trial examiner or agency hearing officer without an opportunity to reply before final decision is made by the administrative agency is not a violation of due process of law conflicts with *Kwock Jan Fat* v. *White,* 253 U. S. 454, 459, 463, 464; *Morgan* v. *United States*, 304 U. S. 1, 22, 23; *Interstate Commerce Comm'n* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 91-92, 93; *United States* v. *Abilene & S. Ry. Co.,* 265 U. S. 274, 290; and *Oregon R. R. & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 524.

In the case of *Morgan* v. *United States,* 304 U. S. 1, the Court said: "Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command. No such reasonable opportunity was accorded appellants." (304 U. S. at page 19) Identically the same secret proposal was made here by the Department of Justice, and the appeal board acted upon it in this case without the knowledge of the ap-

pellant in time to protect himself. The star-chamber procedure prescribed by the regulations is a denial of due process of law. It conflicts with the "fair and just" provisions of Section 1(c) of the act, and the Fifth Amendment to the United States Constitution.

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

It is respectfully submitted that the trial court should have granted the motion for judgment of acquittal.

CONCLUSION

Wherefore appellant prays that the judgment of the court below be reversed and the cause be remanded with directions to enter a judgment of acquittal and discharge the appellant.

Respectfully,

Hayden C. Covington,

124 Columbia Heights,
Brooklyn 1, New York,

Counsel for Appellant

July, 1954.